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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ADRIAN SCHOOLCRAFT,

4 Plaintiff,

5 v.

10 CV 6005 (RWS)

6 THE CITY OF NEW YORK, ET AL.,

7 Defendants.

8 -----x

New York, N.Y.
September 17, 2014
12:01 p.m.

9
10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13 APPEARANCES

14 LAW OFFICE OF NATHANIEL B. SMITH

15 Attorney for Plaintiff

16 BY: NATHANIEL B. SMITH

AND

17 LAW OFFICE OF JOHN DAVID LENOIR

BY: JOHN DAVID LENOIR

18 NEW YORK CITY LAW DEPARTMENT

19 Attorneys for Defendants City of New York, NYCPD and
individual officers

20 BY: SUZANNA PUBLICKER METTHAM

21 RYAN GLENN SHAFFER

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23 BY: WALTER A. KRETZ, JR.

E9HPSCHC

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E9HPSCHC

(In open court)

(Case called)

MS. METTHAM: Good afternoon, your Honor. We're here for a motion to compel expert discovery from plaintiff's expert. I don't know if you would like to start with the easiest part or the more difficult one.

THE COURT: That's hard. Well, do whatever you think is the most persuasive.

MS. METTHAM: Well, then I won't start with the most difficult one for your Honor. Your Honor, plaintiff has identified two police practices experts, Eli Silverman and Joe Eterno, and he's presented an expert report for these individuals. The expert report is very lengthy, and within that expert report, the experts cite to a large amount of data, information and research which has not been produced by plaintiff during discovery or by the experts as part of their expert report or in a publicly available format in their list of references that the defendants can access.

This data is extremely integral to the City defendants and Defendant Mauriello's ability to challenge these experts on issues of CompStat pressure, on issues of police management practices, and therefore. We've asked plaintiff to produce it. He has refused, saying that since, for example, their survey on which some of this data is based was done unrelated to this case, it shouldn't have to be produced.

E9HPSCHC

1 So what we're seeking from that, those two surveys
2 done by Professor Silverman and Eterno from 2008 and 2012 which
3 they've cited and used in their expert report, one, is raw
4 data. So they received surveys from hundreds and thousands of
5 retired police officers. We would like the actual data from
6 those surveys.

7 Now, the surveys are anonymous. We're not seeking the
8 names of the individuals or identifying information about them,
9 but we are seeking the results from the raw data of the surveys
10 they've completed so that we can compare answers. For example,
11 the year in which the individual retired, to the amount of
12 pressure they claim to have been subjected to in an effort
13 actually to limit this to the time period relevant to this
14 case, since the individuals surveyed by Silverman and Eterno
15 have ranged from retirees in the first half of the 20th century
16 to as recent as the last two years.

17 We're also seeking narrative responses, as both
18 surveys included narrative sections which allowed the
19 respondents to expound personally about their feelings, which
20 the authors, Professor Silverman and Eterno, said they relied
21 on in coming to their opinions. So we'd like to see the full
22 narrative responses to understand what data was relied on by
23 the experts.

24 Moving away from the survey, the experts also relied
25 on what they called hospital data from 2006 from the Health and

E9HPSCHC

1 Hospital Corporation, but in the references section, it's just
2 a link to the Health and Hospitals Corporations' website.
3 There's no link to any specific data, research, survey on which
4 they relied. We have no idea what they're referencing.

5 They've also mentioned a number of nonpublic sources
6 such as PBA statements which were not made public. To access
7 these statements, you need a membership in the Patrolman's
8 Benevolent Association. We've asked that these documents on
9 which they've relied and cited to in their report be provided
10 to defendants.

11 And, additionally, they've included information about
12 other whistleblowers that are not a part of the Schoolcraft
13 matter, a Sergeant Borrelli and an Officer Polanco. They've
14 cited to recordings and documents on which the experts have
15 relied that have never been produced to defendants in discovery
16 in this case and have not been produced afterwards. So, you
17 know, we're seeking what we believe rule 26 provides, which is
18 the data and information on which the experts relied in coming
19 to the conclusions in their report.

20 THE COURT: Anything else?

21 MS. METTHAM: That is the first issue. Would you like
22 me to address the other ones as well?

23 THE COURT: Sure.

24 MS. METTHAM: Sure. The next issue, your Honor, is
25 plaintiffs have -- or plaintiff has limited us; so we've asked

E9HPSCHC

1 for a certain of the experts to have a day and a half, and
2 other ones two days of deposition testimony. He's only agreed
3 to produce them each for one day. Plaintiff's position was
4 that all five different sets of defendants' counsel can depose
5 them within the seven hours and then, if required, later could
6 move the Court for additional time after the first deposition.

7 Given that there are five different sets of defendants
8 who are all defending against claims made in these expert
9 reports, we require additional time. We know this in advance.
10 We have spoken among ourselves. It is not our intention to be
11 duplicative in any fashion in the questioning of these experts,
12 but I don't think it's reasonable for expert reports that are
13 dozens of pages long to have only seven hours of deposition
14 testimony by five different sets of defendants with very
15 different liabilities.

16 THE COURT: What do you want, a day and a half?

17 MS. METTHAM: For Dr. Lubit, I believe it's two days.
18 For the one of the medical experts and for Professors Silverman
19 and Eterno, a day and a half each.

20 THE COURT: Does the city have any experts?

21 MS. METTHAM: At this time, we do not, your Honor.

22 THE COURT: At this time, do you still have time to
23 designate?

24 MS. METTHAM: Well, your Honor, we do still have
25 tomorrow. The problem is, without the survey data, we don't

E9HPSCHC

1 know if we need an expert to analyze the data for us and what
2 format.

3 THE COURT: All right. Thank you.

4 MS. METTHAM: However, I am aware that the other
5 defendants have hired experts and do intend to provide expert
6 reports.

7 THE COURT: Any agreement on those, the time for
8 those?

9 MS. METTHAM: On the time for the depositions of
10 those? The Court had provided previously a time line for the
11 deposition of defendants' experts.

12 THE COURT: But I'm talking about the duration, any
13 agreement?

14 MS. METTHAM: No, there have not been yet, your Honor.
15 However, we believe that would be a bit of an easier matter as,
16 you know, we haven't seen the expert reports, they are not due,
17 at the very earliest until tomorrow.

18 THE COURT: Okay.

19 MS. METTHAM: But, you know, it would mostly be
20 rebutting plaintiff's expert, not an indictment of all other
21 defendants.

22 THE COURT: All right.

23 MS. METTHAM: I hope.

24 THE COURT: Anything else?

25 MS. METTHAM: Yes, your Honor. On a list of cases on

E9HPSCHC

1 which -- in which the plaintiff's experts have given testimony
2 in the last four years, as required by rule 26, plaintiff
3 agreed in his opposition to provide such a list. We just ask
4 that your Honor order him to do so by a date certain, since the
5 depositions are beginning a week from today.

6 Additionally is the issue of the expert's
7 compensation. Plaintiff has provided us with generally, you
8 know, these experts charge X amount per day and X amount per
9 hour, but he has not provided us with the amounts that they
10 were actually compensated for the study. Defendants believe
11 that, according to rule 26, a party must provide the actual
12 compensation paid for the study. Plaintiff has not done so.

13 Additionally on the compensation angle, plaintiff has
14 demanded that the defendant pay, No. 1, in advance for the
15 expert's deposition time and also that defendants pay all of
16 the expenses for the travel and travel time of his experts, who
17 are apparently coming from out of state and from hours away.

18 Defendants challenge that. There's case law from the
19 Southern District stating that plaintiff can find an expert
20 within the district without having to burden the defendants
21 with the cost of that expense. Additionally, that travel time
22 is improper as it could be used for preparation time, which we
23 are already paying his experts for.

24 Finally, I had actually brought up the issue with
25 plaintiff over a month ago that the City cannot pay in advance

E9HPSCHC

1 for these depositions without certain information. We need
2 invoices, we need tax identification numbers, we need receipts,
3 you know, being we have to go through these certain processes
4 which take two to three weeks, at least, which I informed
5 plaintiff of. He hasn't yet provided us with the information,
6 even if we were to agree to pay in advance, to do so.

7 So we ask that your Honor allow defendants to pay the
8 experts after the deposition for the actual hours expended and
9 only for preparation time and actual deposition time. Thank
10 you, your Honor.

11 THE COURT: Anything from the plaintiff?

12 MR. SMITH: Yes, your Honor. On the last issue about
13 compensating the plaintiff's experts, that's a new issue. It
14 wasn't in the letter. I can address it now, but I don't have
15 the case authority that I think supports their position on
16 that. So I think it's a little bit out of school to bring that
17 up since it was not in the letters.

18 THE COURT: Well, the payment after, rather than
19 before, that seems simple. Doesn't it?

20 MR. SMITH: Yes. It's a question of how much.

21 THE COURT: Well, how much. Doesn't it seem clear
22 that the rates have to be stated and the past compensation has
23 to be stated?

24 MR. SMITH: That has been done, and the approximate --

25 THE COURT: I didn't understand that from what the

E9HPSCHC

1 City just told me.

2 MR. SMITH: No, they said they're willing to pay for
3 deposition time and prep --

4 THE COURT: No, no.

5 MR. SMITH: It's the travel time that I'm hearing that
6 they're saying --

7 THE COURT: The travel time is agreed it's too much.

8 All right. Okay. So but the City also wants the
9 amounts that they've been paid in the past for the study.

10 MR. SMITH: And I've provided that information. I
11 said this is how much they get paid, this is how much they're
12 charging me on an hourly basis either for the time that they're
13 doing for me, or one of the doctors says I charge for testimony
14 deposition or trial on a half day or full day.

15 THE COURT: I'm hearing a disconnect. Yes, ma'am?

16 MS. METTHAM: Your Honor, he has provided the general
17 rates. He has not actually told us how much plaintiff has paid
18 him for the study. That's what we're seeking, is what he's
19 actually compensated the experts.

20 MR. SMITH: Well, all right. Fine. I don't think
21 they're entitled to that information, but they can certainly
22 ask the expert in a deposition how much have you billed, how
23 much have you been paid, but we're getting a little bit out of
24 school here. The rules don't authorize any of their requests
25 for all of this information from the experts, which I'd like to

E9HPSCHC

1 get to the heart of the motion before us today.

2 THE COURT: Yes, well, okay. But I don't see any
3 reason not to give them the amounts. Although, obviously,
4 that's something that can be covered in the deposition.

5 MR. SMITH: It seems to me that that's --

6 THE COURT: Yes.

7 MR. SMITH: I mean, that's the right way to handle it.

8 THE COURT: As far as all the exhibits, the data,
9 we'll just say data. Why not?

10 MR. SMITH: Okay.

11 THE COURT: Raw data, for example, on the surveys.

12 MR. SMITH: Right. I'd be happy to address that. The
13 federal rules clearly provide what an expert is required to
14 disclose in an expert report, and what they're required to turn
15 over is information that they relied upon in preparing the
16 report.

17 And notwithstanding what the City has said, we have
18 done that. We have provided them with the information that
19 they relied upon in generating their reports. So, for example,
20 both of them wrote a book in 2012, Crime Numbers Game. It's --
21 and Mr. Silverman wrote an earlier book in 1994 about CompStat
22 and about how CompStat has changed over the years from actually
23 what was a very good idea into an idea that created
24 inappropriate incentives.

25 Anyhow, the rules don't authorize the defendants to

E9HPSCHC

1 request and do not obligate the experts to turn over all of the
2 information that they generated over the many years that
3 they've been studying this area. One of the areas that they
4 studied in 2008, and then with a follow up in 2009, was a
5 survey that they sent out to a lot of retired captains and
6 above.

7 They reported on those surveys. They reported on the
8 survey -- on one of them in this book. In fact, the questions
9 and the answers are in a summary, which I sent along with my
10 letter. So they've been working on police CompStat issues for
11 many, many years.

12 What the City wants to do is say, well, you rely on
13 your findings from 2008; so we're entitled to all of the data
14 that was -- that was used and created in order to reach that
15 conclusion.

16 The point -- my point is that they didn't, in
17 preparing these reports, rely on any of that raw data or
18 anything else. In the academic literature that they are
19 familiar with and that they contributed to, they relied on many
20 things. And they cited in an appendix many of these --

21 THE COURT: But their report here.

22 MR. SMITH: Their report here refers to the results of
23 the 2008 and the 2012 survey and, I mean, there's --

24 THE COURT: Well, so they should provide the 2008
25 survey.

E9HPSCHC

1 MR. SMITH: That has already been -- that's in their
2 book. The survey's in their book and the data -- what the City
3 wants to do is have them go get file cabinets from almost a
4 decade ago and pull out all of that, and challenge it. And the
5 rules don't authorize that. They're required to turn over the
6 stuff that they looked at in generating their report.

7 If this is correct, then every expert who ever relies
8 on anything that they ever said in the past, has to turn over
9 all of the research that they ever conducted in order to rely
10 on a piece of work that they did in the past. That's why I say
11 in order to resolve this motion fairly, you have to look at
12 what the rule requires. The rule doesn't require full-blown
13 discovery about everything.

14 The experts are not parties in a civil litigation.
15 They are providing information about what they looked at in
16 order to generate their report. The irony about this is that
17 in the Floyd case, they already took Silverman's deposition on
18 the 2008 survey, and they got the information that Judge
19 Scheindlin in that case gave them. And Eli Silverman, Dr. Eli
20 Silverman testified in the Floyd case, and Judge Scheindlin
21 already found that the surveys show that there was CompStat
22 pressure being generated on supervisors in the periods under
23 discussion.

24 So they could rely on their prior writings. They
25 could also rely on Judge Scheindlin's findings in the Floyd

E9HPSCHC

1 case, a finding after a bench trial on a fact. So without any
2 explicit authorization in the federal rules, it's really unfair
3 to these experts to require them to open up all of their file
4 cabinets for all of their research if they --

5 THE COURT: What was Judge Scheindlin's determination
6 with respect to what the experts had to supply?

7 MS. METTHAM: Your Honor, if I may?

8 MR. SMITH: I'll answer that question.

9 MS. METTHAM: To begin with, your Honor, plaintiff
10 misstated to the Court on multiple occasions. Eli Silverman
11 was not an expert in the Floyd trial. I was trial counsel in
12 that matter. I'm very familiar with it. Eli Silverman was a
13 fact witness that was identified very belatedly. Judge
14 Scheindlin allowed only limited discovery, both limited
15 discovery and deposition testimony.

16 MR. SMITH: Your Honor, I object to the interruption.
17 I really do.

18 THE COURT: Well, let's let the plaintiff finish.

19 MS. METTHAM: Okay.

20 THE COURT: Okay. So what did Scheindlin do?

21 MR. SMITH: Judge Scheindlin, in her opinion and order
22 resolving the Floyd case, this is --

23 THE COURT: I don't care about the substance. I'm
24 only interested in what did she do on the issue of the expert
25 report and the data that underlay it.

E9HPSCHC

1 MR. SMITH: Oh, what she did was she said you can take
2 Silverman's deposition, you can have the surveys, not all the
3 underlying data. And they took his deposition and then
4 Silverman testified at the Floyd trial about the subject, and
5 the Court found that --

6 THE COURT: Okay. All right.

7 MR. SMITH: -- that there was this --

8 THE COURT: In other words, the survey, the data
9 underlying the surveys is appropriate to be turned over.

10 MR. SMITH: She did not order the underlying data to
11 be turned over. She ordered the surveys, which are the
12 questions. What happened was they had a 20-question
13 questionnaire, and they mailed them out to retired guys, and
14 then they got a whole bunch of responses. And then they took
15 all that data and they compiled it into summaries. And the
16 summaries are in the report.

17 And the actual raw data, they didn't have to produce.
18 They told me that -- you know, they don't want to have to open
19 up their entire files to the City or to anybody else about
20 their research. It's a never-ending problem for them. I mean,
21 this is their --

22 THE COURT: Anything else you want to tell me?

23 MR. SMITH: Yes. It's not just the raw data that
24 they're asking for. It's electronic databases used to compile
25 these surveys. They're asking for their notes on those

E9HPSCHC

1 surveys. They didn't rely on these notes in creating the
2 report for this case. They're asking for a list of other
3 researchers or professors who aided them in their prior survey
4 research, drafts of articles and surveys used by them in the
5 past.

6 THE COURT: But none of this has been referred to in
7 the report?

8 MR. SMITH: No, none of it. The raw data wasn't
9 referred to in the report either.

10 THE COURT: No, I know, but the survey was in the
11 report.

12 MR. SMITH: The conclusions from the surveys were.

13 THE COURT: Yes.

14 MR. SMITH: That's true. So I think I've covered that
15 first issue. I would just say, you know, Judge, if you look at
16 rule 26, it does not open up the experts to this kind of
17 full-blown discovery. The rules are very clear.

18 If you sit and you read it, it says that they've got
19 to turn over what they relied on. And I told the experts that
20 if you want to protect yourself and you don't want to open
21 yourself up to everything, don't rely on anything, and then you
22 won't have to turn it over. And so now, if the City is
23 actually successful in this motion, they're going to -- they've
24 asked me to reconsider even using the surveys because it's
25 unfair to them. But anyhow, I'll cross that bridge when I have

E9HPSCHC

1 to.

2 Moving on to the seven-hour issue versus a day and a
3 half to two days. You know, I hate to be a stickler for
4 technicalities, but the federal rules say presumptively seven
5 hours. And if the defendant or plaintiff thinks they need more
6 than seven, they have to make a record, they have to show how
7 they need more.

8 All we hear is a lot of conclusionary statements about
9 how, well, there's five defendants and, of course, we need a
10 day and a half or two days. But there's no -- there's been no
11 showing here that they actually require this. I had to limit
12 myself to a day for some of the principal defendants in this
13 case. Mauriello was only a day and not a nickel more, and this
14 is a huge fact witness in this case.

15 These experts have rendered detailed reports
16 expressing their opinions. They've provided resumes. They've
17 provided prior testimony. These defendants are perfectly
18 capable, I think, of focusing in on what they need, and if they
19 can show that they need more, the rules require that they do
20 that. And I respectfully submit to you they haven't shown that
21 they need more. They just say that they need more.

22 I think that covers it. I'll address this issue about
23 the time list and the amount of the payments now or I'll
24 address it in writing. I did some research to support the
25 propositions that these experts are entitled to one-half of

E9HPSCHC

1 their travel time. They're coming from Providence, Rhode
2 Island, the Upper West Side, West Chester and Long Island; so
3 we're not talking about the other end of the country or the
4 world.

5 In any event, I've asked for one-half of their hourly
6 rate, which is consistent with my understanding of the case law
7 in this circuit. And I also ask, because the experts asked me,
8 to get the money upfront because they don't want to have to
9 chase after the defendants to get paid after the depositions.
10 I agree with your Honor, it's easier to do it after, but it's
11 their time. They ought to be paid for their time. And if you
12 want, I'll submit the authority that I have for the position
13 I've taken. I don't think it's necessary, but I'd be happy to
14 do so.

15 THE COURT: Okay. Thank you.

16 MS. METTHAM: Your Honor, first address --

17 THE COURT: Excuse the interruption.

18 MS. METTHAM: Sure.

19 THE COURT: This is something that the City must face
20 all the time.

21 MS. METTHAM: Which part?

22 THE COURT: This business about bills and so on and
23 advance payments.

24 MS. METTHAM: And typically we pay the experts after
25 the expert's deposition has been taken.

E9HPSCHC

1 THE COURT: Let me put it to you differently. Have
2 you ever advanced the money?

3 MS. METTHAM: I have.

4 THE COURT: Okay. Good.

5 MS. METTHAM: But when I've paid the expert in
6 advance, I was given an invoice by the plaintiff about a month
7 prior with all of the information required. It was a
8 straightforward issue. I paid him. The check actually got
9 there the day before, but --

10 THE COURT: Okay.

11 MS. METTHAM: -- typically we pay after.

12 To address the issue of Scheindlin, again, I must
13 stress, your Honor, that Professor Silverman was not an expert
14 in that case. And the reason that's important is that her
15 decisions were very much motivated by the fact that he was not
16 an expert in that case.

17 So plaintiff is also mistaken that we did receive
18 underlying data from the surveys. We also received the full
19 narrative data from the surveys

20 THE COURT: I'm sorry?

21 MS. METTHAM: We did receive narrative data from the
22 surveys in Floyd. So Professor Silverman and Eterno had
23 narrative responses to certain questions in their surveys in
24 2008 and 2012. Judge Scheindlin ordered them to produce
25 certain of those narrative responses from the underlying data.

E9HPSCHC

1 THE COURT: I'm not getting word.

2 MS. METTHAM: Narrative, summaries? The area where
3 the respondent to the survey was able to expound without
4 checking a multiple-choice question. So the raw data from the
5 actual survey, what the respondent's typed or hand wrote,
6 which --

7 THE COURT: Was produced?

8 MS. METTHAM: It was produced.

9 THE COURT: And it will be here.

10 MS. METTHAM: I would hope so, your Honor.

11 THE COURT: Yes, it will be here. Okay?

12 MS. METTHAM: Yes, your Honor.

13 THE COURT: And that's consistent with what Judge
14 Scheindlin did?

15 MS. METTHAM: Yes, she did order the narrative --

16 THE COURT: Okay.

17 MS. METTHAM: -- information.

18 THE COURT: Okay.

19 MS. METTHAM: In terms of the other data, the reason
20 that there is a difference here in terms of the actual survey
21 responses is that in the Floyd matter, because he wasn't an
22 expert, and Professor Silverman was very limited in what he was
23 allowed to testify on. And he was only allowed to testify on
24 the pressures that they believed came from stop, question and
25 frisk information. That was only one of about 24 questions in

E9HPSCHC

1 the survey. So all of his discovery, his deposition, his trial
2 testimony was limited to stop, question and frisk pressures.

3 In this matter, the plaintiff's experts have used the
4 survey data and responses in a much broader way. They're
5 talking about CompStat data generally on stop, question, frisk,
6 on summonses, on arrests. They talk about the pressure of
7 CompStat to -- the impact on constitutional rights.

8 And the issue, your Honor, here is with them as
9 experts, we need to probe their survey so that we can make an
10 appropriate Daubert and Kumho Tire motion to exclude these
11 experts based on how they've conducted the survey on the age,
12 the numbers of the retirees, when they retired, what kind of
13 pressure.

14 For example, your Honor, plaintiff's experts -- and
15 this is Exhibit E to my September 4th motion of their report
16 and starting on Page 16 are the survey findings. And in the
17 survey findings the experts have lumped responses into these
18 subjective categories of low, medium and high and found that
19 retirees who retired before 1995 felt one way, from 1995 to
20 2001 felt another, and 2002 until 2012 felt a different way.

21 The reason we need the underlying data is that we
22 don't believe that these categories are appropriate. We don't
23 believe that cutting it off before 1995 -- we think that if you
24 changed that year, so if the respondent said he retired in
25 2000, that we want to see what retirees in that year said.

E9HPSCHC

1 Instead of saying plaintiff's experts' category of low, we want
2 to know if they said a one, a two or a three in response.

3 We just simply need more qualitatively data to be able
4 to analyze their survey and to challenge their survey
5 responses. And plaintiff here has said that his experts are
6 not relying on this data in their report, but again, I would
7 direct the Court, respectfully, to the report starting on
8 Page 14, where they spend a dozen pages talking about the 2008,
9 2012 expert -- I mean surveys, going through the survey
10 findings and linking it to this case. So instead of simply
11 saying we've done a survey in the past and this has kind of
12 changed our opinion, they've heavily relied on it in this
13 matter.

14 And in terms of the other data on which they've
15 relied, No. 1, I would direct the Court to Federal Civil
16 Procedure 262(b)(2), which requires an expert to include the
17 facts or data considered by the witness in forming their
18 opinions. So contrary to plaintiff's opinion that the federal
19 rules simply don't require an expert to provide this
20 information, it's pretty clearly written that if an expert
21 relies on data or information, they must include that in their
22 expert report.

23 And while the survey is one part, plaintiff's experts
24 also spend a large amount of time talking qualitatively about
25 CompStat, mentioning non-NYPD data sources which aren't

E9HPSCHC

1 identified anywhere in the footnote, in the references. They
2 make their own opinions about evidence that NYPD leadership
3 altered and misused CompStat, that the CompStat crime reduction
4 system has been emulated in other cities.

5 They're relying on a lot of information which they
6 haven't provided data or information on, and we're seeking to
7 get that data so that we can challenge this report
8 appropriately, your Honor.

9 MR. SMITH: Can I respond to that, your Honor?

10 THE COURT: I think we will have what we'll call the
11 Scheindlin rule for the 2008, 2012 surveys. Any identified
12 fact or literature will be produced. The depositions will be a
13 day, with the understanding that if more is needed, an
14 application will be made, and there will be no additional
15 travel time or anything of that kind. You know, the trouble
16 with that is we're just putting off that problem, but, okay.

17 Well, let's back up a little bit. Okay. I guess what
18 we should do is you'll tell me -- it's totally predictable, but
19 you'll tell me when these depositions are scheduled, and we
20 will have a conference at the close of the day to determine
21 whether or not there should be additional. Now, quite frankly,
22 I'm pretty sure there will be, but okay, we'll see.

23 MS. METTHAM: Your Honor, if I may interrupt to ask a
24 question about how that would work in reality in that with five
25 separate defendants, you know, if we're all supposed to split

E9HPSCHC

1 the first seven hours, you know, if one defendant --

2 THE COURT: You can do whatever you want to do. With
3 such an array of such skilled and experienced lawyers, I
4 wouldn't dare contemplate how you should split up your time or
5 who does what with which and to whom. And if somebody can come
6 forward and say this is an area that I want to examine on and
7 it hasn't been covered, well, we'll hear it.

8 MS. METTHAM: And, your Honor, might I just ask that
9 if a defendant were to finish questioning to allow time for
10 another defendant, that they would not, you know, give up any
11 rights to additional questioning on the second date, if the
12 Court were to grant such a motion?

13 THE COURT: Well, okay. That's interesting. The
14 plaintiffs will provide an invoice for one-half the travel
15 time. You know, really. Well, all right. And what have I
16 missed, anything?

17 MR. SMITH: There's one thing that I need to raise
18 now, which is the City is saying tomorrow their expert reports
19 are due and they're not going to provide any, and I'm concerned
20 that this is going to scuttle the schedule that we already
21 have.

22 THE COURT: Well, listen, enough is enough. Okay.
23 Thank you all.

24 MR. KOSTER: Your Honor?

25 THE COURT: I thought so.

E9HPSCHC

1 MS. METTHAM: Just real quick, your Honor. I just
2 want a clarification. When you told plaintiff that he must
3 provide identified facts or literature, to be more specific,
4 you know, is plaintiff required to provide the narratives? Is
5 he required to provide the survey responses?

6 THE COURT: Yes. And that was done in the Scheindlin.

7 MS. METTHAM: Not all of the survey responses were
8 provided in Floyd.

9 THE COURT: What was the distinction?

10 MS. METTHAM: So the narrative responses, the
11 long-form written responses were provided but not all of the
12 multiple choice underlying data was provided. And, again, your
13 Honor, the multiple choice is what we believe is relevant so
14 that we can look into the actual years that these
15 individuals --

16 THE COURT: All right. You can have the multiple
17 choice and the narratives.

18 MS. METTHAM: Thank you, your Honor.

19 MR. RADOMISLI: Your Honor, I don't think your Honor
20 ruled on whether we have to pay in advance or not.

21 THE COURT: Say it again?

22 MR. RADOMISLI: I'm not sure whether your Honor ruled
23 on whether we have to pay in advance, or we can see how much
24 time is actually spent.

25 THE COURT: Well, the transportation in advance. And

E9HPSCHC

1 I would think that you can't pay in advance when you don't know
2 how long it's going to go; so....

3 MR. RADOMISLI: Thank you, your Honor.

4 THE COURT: Yes.

5 MR. KOSTER: Your Honor, regarding the deadline to
6 respond to plaintiff's expert discovery, based on your last
7 order from plaintiff's motion to compel, there are still
8 several depositions that the parties have to complete,
9 including medical defendants. I represent Dr. Aldana-Bernier.

10 In the interest of not having to provide potential
11 multiple expert reports, whether any reports will be changed or
12 altered based on further deposition testimony, I'd ask for an
13 extension of time for the defendants to respond. And I'm
14 willing -- and I think we'll all be willing to grant the
15 plaintiff the courtesy that if he needs to amend his expert
16 report based on the deposition testimony that will be
17 forthcoming --

18 THE COURT: That seems to make sense.

19 MR. KOSTER: -- that he's allowed to do so.

20 MR. SMITH: No, it doesn't make sense. We have a
21 schedule. I'm trying to get this case ready for trial, your
22 Honor. All the defendants' expert reports are due tomorrow.
23 Last month, in August, I worked very hard with all of my
24 experts to get expert reports served pursuant to the scheduling
25 order, and now I'm being told that we're not going to have what

E9HPSCHC

1 we're supposed to have, or because you dropped your pencil,
2 we're not going to give it to you and, you know --

3 THE COURT: Wait a minute.

4 MR. SMITH: Well --

5 THE COURT: Factually, are the experts, all the expert
6 depositions scheduled?

7 MR. SMITH: Mine are. They haven't even designated
8 who their experts are yet, and now I'm hearing that, although
9 they were supposed to do it tomorrow --

10 THE COURT: They will do it tomorrow.

11 MR. SMITH: -- it's not going to happen.

12 THE COURT: They will do it tomorrow.

13 MR. KOSTER: Your Honor, just in that sense, I believe
14 Mr. Smith has misrepresented certain things to the Court in
15 which he was granted multiple extensions of time to file his
16 expert reports. This simple request for a short extension on
17 behalf of the defendants, I don't think is unreasonable.

18 THE COURT: Well, designate. If you have to change
19 the designation or make another determination, you can try to
20 do that later based on subsequent events. I don't know how
21 successful it will be.

22 MR. KOSTER: Thank you, your Honor.

23 MR. SHAFFER: Your Honor, Ryan Shaffer for the City
24 defendants. Just to give your Honor an idea of something that
25 is coming your way, so to speak.

E9HPSCHC

1 Last Friday Mr. Smith identified an additional 17,
2 perhaps more, fact witnesses despite the fact that he was
3 ordered to identify those witnesses back in February. The City
4 defendants do intend to put it in a letter to your Honor
5 addressing this issue, but since the issue of scheduling is
6 sort of on the table, I wanted to let your Honor know that that
7 is coming in your direction.

8 THE COURT: And I take it you're resisting the
9 additional fact witnesses?

10 MR. SHAFFER: Right, because we're seven months past
11 the deadline to have disclosed those witnesses and two months
12 past the deadline for all the fact discovery to be completed.

13 MR. SMITH: What I did, your Honor, is as I've
14 continued my investigation into the facts of this case -- Now,
15 look, this is bushwhacking.

16 THE COURT: Of course.

17 MR. SMITH: Of course it is.

18 THE COURT: What, is that unusual?

19 MR. SMITH: No. So then allow me the opportunity to
20 provide a fulsome response.

21 THE COURT: No, no. I understand, but I'm wondering,
22 tell me about the schedule, which I'm sort of lost on.

23 MR. SMITH: I'd be happy to. It's right here. I can
24 hand it up to you. The schedule -- the last schedule was
25 July 18, and it provided firm dates for fact discovery, expert

E9HPSCHC

1 discovery and motions. Based on scheduling problems with the
2 depositions, your Honor, in a letter, an endorsed order moved
3 back all of the dates set forth in this schedule one week.
4 That was on consent.

5 And right now, we're scheduled to have all dispositive
6 motions returnable in this courtroom November 5, and we're
7 supposed to have expert disclosure completed by October 16th;
8 so....

9 THE COURT: Now, fact witnesses, when they were
10 supposed to be -- that was supposed to be completed by --

11 MR. SMITH: There was no deadline for identifying fact
12 witnesses. My understanding is that you have an ongoing
13 obligation to supplement your disclosures. The only deadline
14 that I'm aware of that the Court imposed on me was we -- I'm
15 sorry, we're going to have to step back.

16 Five or six months ago I learned that there were a
17 large number of police officers who responded to a website
18 called Schoolcraft For Justice, and I obtained from prior
19 counsel a stack of e-mails and correspondence from many, many
20 police officers responding --

21 THE COURT: Okay.

22 MR. SMITH: -- to basically B2s, and I was concerned
23 about confidentiality. And your Honor said if you want to use
24 any of these police officers, you have to identify them out of
25 this stack. And I did I identified one Lieutenant, whose name

E9HPSCHC

1 was Joe Ferraro.

2 THE COURT: Okay.

3 MR. SMITH: And because he, for reasons -- I
4 identified him out of that stack and the City took his
5 deposition. He also tape recorded one of the other defendants
6 for conduct that was going on at the eight-one.

7 So in the context of discovery, I've also -- informal
8 discovery, I've discovered that there are many police officers
9 that have brought claims for retaliation against the Police
10 Department for similar kinds of activities, and I served
11 document demands and interrogatories on the City probably in
12 February of this year saying give me information about any
13 claims of retaliation.

14 They objected. Your Honor, unfortunately, from my
15 perspective, agreed, and so they were not required to turn over
16 any of that information. When your Honor told me to
17 supplement, recently, Schoolcraft's financial and emotional
18 distress damages, I also went through and identified all of
19 those police officers who I had made document requests for in
20 February as people who made have knowledge about -- that's
21 relevant to this case, and that's what happened.

22 And I think I have a continuing obligation to do that.
23 If I had more information about those officers, I would have
24 provided that, but the only information I was able to get was
25 from, you know, a Daily news article or reported decision or

E9HPSCHC

1 something like that. And so that is, from my perspective as
2 the counsel for the plaintiff, what happened.

3 THE COURT: But --

4 MR. SMITH: So, you know, I mean, the NYPD has the
5 names of these people who I believe may have information. I
6 don't -- I mean, I don't even have sufficient data right now to
7 send out an investigator for all of them, but I thought, given
8 the fact that I was told to supplement my discovery, and given
9 the fact that I wanted to make sure that I was taking this
10 position that these people may have information --

11 THE COURT: Okay. I think we'll pass it now, and
12 we'll have a further discussion. But let me ask the City. It
13 sounds to me as if maybe I made a mistake on the --

14 MR. SMITH: There were about twelve, roughly around
15 twelve police officers who, according to reported decisions or
16 newspaper articles, made claims that they were retaliated
17 against because they objected to --

18 THE COURT: When you say made claims, I mean, what did
19 they do?

20 MR. SMITH: Well, bring a lawsuit in Federal Court or
21 defended a -- this came up in a few contexts this way. They
22 were actually disciplined for -- I don't remember the name of
23 this officer, but there was one report/decision where an
24 officer was given charges because he issued a bogus summons,
25 and he was -- in an administrative proceeding he was charged

E9HPSCHC

1 with doing something improper.

2 THE COURT: I'm trying to figure out what it is and
3 how did you identify what you wanted the City to give you?

4 MR. SMITH: Well, in this officer, whose name I don't
5 remember, the decision that I'm referring to is an
6 administrative decision which discussed how the officer's
7 defense to the charge that he issued a summons improperly, this
8 was in Staten Island, was pressure on him on a regular basis to
9 issue summonses to satisfy a quota. And so his defense to,
10 yeah, I made up a bogus summons was, you made me do it.

11 And so I asked -- I identified him, and I apologize I
12 don't remember his name, but there's a list of like 15, 12,
13 something like that, of these officers who have made myriad
14 types of claims alleging that they were being punished
15 because --

16 THE COURT: I'm trying to understand. You said they
17 made claims.

18 MR. SMITH: Yes.

19 THE COURT: What is it that they've made claims, for
20 what, against the City? I mean, what would the City know?

21 MR. SMITH: I don't know. I mean, sitting here today,
22 I don't have my file. I don't have my information. I really
23 feel I won't be able to answer your questions more accurately.

24 THE COURT: Okay. We'll pass all of that and wait for
25 the --

E9HPSCHC

1 MR. SMITH: Okay.

2 THE COURT: We'll have to have a conference at
3 whatever time you all think is feasible with respect to the
4 schedule. Okay. Thank you, all.

5 MR. SMITH: Thank you.

6 MS. METTHAM: Thank you, your Honor.

7 (Adjourned)

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